IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 02.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.186 of 1995

Rajendran ... Appellant/Appellant/2nd Plaintiff.

Vs.

1. Chinnathambi Gounder
2. Saroja ... Respondents/Respondents/Defendants.

PRAYER: Second Appeal against the Judgment and decree of the court of the Subordinate Judge, Thiruvannamalai in A.S.No.32 of 1994 and dated 27.07.1994 in confirming the judgement and decree in O.S.No.917 of 1983 and dated 29.10.1993 is even otherwise, illegal, incompetant, without jurisdiction.

For Petitioner : Mr.V.Raghavachari
For Respondents : Mr.R.Karthikeyan

J U D G M E N T

The unsuccessful second plaintiff, is the appellant in the Second Appeal. The appellant and his father (late) Kapoor Gounder have filed the suit for declaration and permanent injunction in respect of the property to the extent of 1.32 acres, which is Eastern part of total extent of 2.73 acres comprised in dry Survey No.440/3 Paramanantham Village, Chengam, Tiruvannamalai District, including the entire well situated in the land.

2. The case of the plaintiffs was that the first plaintiff Kapoor Gounder, Raman, Chinnathambi, who is the first defendant and Chinnaraj Gounder were the sons of Kullu Gounder. The first plaintiff, namely, the father of the appellant has got separated from joint family in 1959 and got his share under a oral partition between brothers, in which the first plaintiff was allotted 1.73 acres of land and the remaining three brothers have been jointly living. The first plaintiff has also executed a release deed on 12.08.1959 marked as Ex.A.1 in favour of his father Kullu Gounder and other brothers. It is the case of the plaintiff that the said Kulla Gounder and three brothers of the first plaintiff have partitioned among themselves orally in 1971 and one of the brother Chinnaraj Gounder has executed a release deed in favour of his brother Raman on 29.10.1971 marked as Ex.A.8 and ultimately the first defendant has become a divided brother much after the partition and allotment of share to the first

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plaintiff.

3. It is the case of the plaintiffs that he has occupied the puramboku land to the extent of 2.73 acres in dry Survey No.440/3 in 1965 and Government has also assigned the said land to the plaintiff on 10.09.1969 along with another person Gopal marked as Ex.A.2. According to the plaintiff, he dug well in the said land in 1970 and enjoying the same. He has sold the Western 1.41 acres in Survey No.440/3 to the first defendant on 17.09.1979 under Ex.A.9 and has retained the Eastern portion along with the well, which is the suit property to the extent of 1.32 acres. Since the defendants out of whom the first defendant is the husband, who is the brother of the first plaintiff and the second defendant is the wife of the first defendant have attempted to interfere, the suit was filed.

4. While the first defendant has admitted the partition from the first plaintiff and also originally 2.73 acres in Survey No.440/3 belonged to the first plaintiff and on 07.09.1979 he has sold 1.41 acres to the first defendant retaining the remaining property. It is the case of the defendant that the properties, which are purchased and in the possession of plaintiff there is no dispute. The dispute is only in respect the well, which was dug by the first defendant. According to the first defendant the suit is filed only with the intention of grabbing the well enjoyed by the first defendant. There was an Advocate Commissioner appointed and on appreciation of various documents, the Trial Court has come to a conclusion that it cannot be decided that the disputed well is situated in the plaintiff's property.

5. The Trial Court has also found that any admission made or a statement given by the first defendant in another suit in O.S.No.787 of 1984 marked as Ex.A.29, cannot itself be sufficient unless the plaintiff proves his case independently. It was also found that under Section 8 of the Transfer of Property Act, when once the property has been transferred, which includes all those which are appurtenant to the same and therefore, the suit well also to be deemed to have been transferred to the first defendant and in that view of the matter, the suit was dismissed. In the mean time, since the first plaintiff died the second plaintiff being his son has filed the appeal and the Appellate Court has also after elaborately discussing the entire issues involved has dismissed the appeal by confirming the decree and judgement of the Lower Court. It is as against the said concurrent finding, the second plaintiff has filed the present Second Appeal.

6. While admitting the Second Appeal this Court has framed the following questions of law:

> "1. Whether the courts below have not erred in law in ignoring the admissions of the defendant as D.W.1 wherein he has clearly stated that there was only one well in existence in the suit property and that the well was in existence even on the date of

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his purchase and that therefore whether the courts below ought not to have held that the suit well belonged to the plaintiff?

2. Whether the courts below have not erred in law in failing to see that the respondent is estopped from contending that he had dug the suit well in view of the prior pleadings that the suit well had been purchased by him and had not been mentioned in the sale deed only with a view to avoid stamp duty?

3. Whether the courts below has not erred in law in ignoring the inconsistencies in the stand of the defendants in various proceedings as has been made evident from Exs.A10 and A.29?

4. Whether the learned Judge has not erred in law in brushing aside the important piece of evidence viz. the adangal extracts filed under Ex.A15 to A26 merely on the ground that they mention a larger extent?

5. Whether the courts below have not erred in holding that the suit in O.S.No.959 of 1983 was withdrawn thereby abandoning any claim that the defendant had over the suit well and therefore he is precluded from instituting suit on the same cause of action or setting it up as a defence under the Provisions of Or.23 Rule 1 (4) C.P.C.?

6. Whether the judgement and decree of the court of the Subordinate Judge, Tiruvannamalai in A.S.No.32/94 dated 27.07.1994 in confirming the judgement and decree of the court of the District Munsif, Tiruvannamalai, in O.S.No.917/83 dated 29.10.1993 is not even otherwise illegal, incompetent, without jurisdiction and is in any event liable to be set aside?"

7. It is also relevant to point out that this Court in an interim order passed in the appeal dated 18.01.2006 by consent of both the counsels have appointed an Advocate Commissioner from Tiruvannamalai to specify the position of the well. The order is as follows:

"Heard the learned counsel for the appellant as well as the respondents. It has been mutually agreed by both the counsels that Mr.G.Pugalenthi, Former Government Pleader, Tiruvannamalai District would be the Advocate Commissioner appointed to give a report along with the sketch with regard to the suit property specifying as to the portion of the well in contention, within a period of four weeks from the date of receipt of a copy of this order. The report alongwith the sketch would be submitted before this court on or before 20.02.2006. The cost Rs.5000/- (Rupees five thousand only) to be paid to the Advocate Commissioner will be borne by the parties equally."

8. Pursuant to the order of this Court, it is also relevant to point out that the Advocate Commissioner has filed a report in respect of the disputed well. The Advocate Commissioner has found that the well is situated on the Eastern side 1.32 acres, which belongs to the defendants. The relevant portion of the report of the Advocate Commissioner filed before this Court is as follows:

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"The disputed well is situated in D.S.No.440/3 (i.e.) in 1.32 cents which absolutely belongs to the respondents Chinnathambi Gounder and Saroja Ammal. There is a dilapidated shed by the side of the well and I have given the measurement of the shed in my plan. The above well in situated at a distance of 6.8 meters from the Lands of the Appellant situated on the western side and a detailed measurements have been given in my plan. In the lands of Appellants Groundnut crops were raised and in the land of respondents paddy crops were raised.

Thus the disputed well is situated on the eastern 1.32 acres which belongs to the Respondents/Defendants.

In my plan I have coloured blue colour to disputed well and Red colour to Chinnathambi Gounder land, Green colour to Rajendiran land.

With the observation I have executed the warrant and I have submitted the report with plan."

9. Therefore, from the report of the Advocate Commissioner it is clear that the disputed well is situated on the defendant's property. The main contention raised by Mr.Raghavachari, learned counsel appearing for the appellant in this case is about the admission of the first defendant as DW.1 that there is only one well situated in the property and that was available even on that date when he purchased the property and however the same was not mentioned in the sale deed marked as Ex.A.9. It is also his further contention that there has been a contrary inconsistent stand taken by the first defendant as per his evidence in some other suit in O.S.Nos.959 of 1983 and O.S.No.787 of 1984 in the District Munsif Court, Tiruvannamalai and marked as Ex.A.10 and Ex.A.29. As far as the contention that D.W.1 has admitted that there was only one well situated in the suit property and that was not mentioned in the document Ex.A.9 as it is correctly found by both the Courts below Section 8 of the Transfer of Property Act, contemplates the transfer of land along with all appurtenance, which includes the well and therefore merely non mentioning of a well under Ex.A.9 document will itself not disentitle the first defendant to claim the same if otherwise such a well was in existence belonging to the first defendant.

10. In the present case both the Courts below have found that the plaintiff has not proved that the disputed well is situated in his land and on the other hand, the Advocate Commissioner appointed at the instance of this Court as I have stated earlier on inspection in the presence of both the counsels has clearly found that the well is in fact situated in the property belonging to the first defendant.

11. In view of the same there is absolutely no difficulty to come to the conclusion that non mentioning of well under Ex.A.9 itself is not sufficient to prove that the well is situated in the plaintiff's property. As far as the other submissions made by the learned counsel for the appellant that the defendant has chosen to give contradictory statements

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under Ex.A.10 and Ex.A.29, which are all findings given in some other proceedings in which the first defendant is stated to have been a party. The learned counsel for the appellant would rely upon the judgement of the Hon'ble Supreme Court rendered in Prakash Chand Sharma and others Vs. Narendra Nath Sharma reported in AIR 1976 SC 2456 to substantiate his contention that in such cases wherein a party gives the deposition in different proceedings unless the context under which he was made to give such statement in different proceedings is clearly explained, such a statement can be used in a subsequent suit against him.

12. A reference to the judgement of the Courts below show that in fact the D.W.1 has explained clearly stating that under Ex.A.9 he has not stated that his brother has sold along with well and the reason for that was by including the well he may have to pay more stamp duty.

13. On the other hand, the Courts below have in fact come to the conclusion that when it was the case of the plaintiff that while selling the property, he has retained the well that was not the content of the sale deed and also found that it is in the 1.41 acres which was sold to the first defendant the well is situated. In view of the above said facts I do not think that D.W.1 has not chosen to explain the contents of Ex.A.29. On appreciation of Ex.A.10 and Ex.A.29 apart from all other documents relied upon by the plaintiff the Courts below have come to a conclusion that the first plaintiff has not proved that he has retained the well with him, while he was selling the remaining portion of 1.41 acres to Chinnathambi Gounder, namely, the first defendant.

14. In view of the above said facts and circumstances of the case, I do not think that there is any inconsistency under Ex.A.10 and A.29 and in any event that is not going to be helpful to the plaintiff's case, since it is found by both the Courts below that the plaintiffs have not proved their case that they have retained the well with them while selling 1.41 acres of land to the first defendant under Ex.A.9 sale deed. In view of the same, there is absolutely no substantial question of law involved in this case. The Second Appeal fails and the same is dismissed with costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To
1. The Sub court, Thiruvannamalai.

2. The District Munsif Court, Thiruvannamalai.

+ 1 CC To Mr. R.Kathikeyan, Advocate SR NO.20697

+ 1 CC To Mr. V.Raghavachari, Advocate SR NO.21223

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